IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL CONFIRMATION CASE No. 9 OF 2004

WITH

CRIMINAL APPEAL NO. 1915 OF 2004

For Approval and Signature:

HONOURABLE MR.JUSTICE A.L.DAVE
HONOURABLE MR.JUSTICE BANKIM.N.MEHTA

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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STATE OF GUJARAT - Appellant(s)
Versus
RATANSINH @ CHINUBHAI ANOPSINHCHAUHAN - Respondent(s)

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Appearance :

C.C. No.9 of 2004

MR ND GOHIL, APP, for the State.
MR MJ BUDDHBHATTI with MR JITEN M. BUDDHBHATTI for the Accused.

Criminal Appeal No.1915 of 2004

MR MJ BUDDHBHATTI with MR JITEN M. BUDDHBHATTI for the Accused.
MR ND GOHIL, APP, for the State.

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CORAM : HONOURABLE MR.JUSTICE A.L.DAVE
and
HONOURABLE MR.JUSTICE
BANKIM.N.MEHTA

Date : 14/09/2006

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE A.L.DAVE)

1. Learned Additional Sessions Judge and Second Fast Track Court Judge, Panchmahals, at Godhra, decided Sesisons Case No.4 of 2004 on 7th October, 2004 and convicted Ratansinh alias Chinubai Anopsinh Chauhan for the offences of rape and murder of minor-K, allegedly, committed by him on 16th August, 2003, at about 15.00 hours, at Mota Falia, at Village Bhamaiya of Godhra Taluka of Pamchmahals District. The Trial Court awarded capital punishment for the offence of murder and imprisonment for life and fine of Rs.1000/- for the offence of rape and, in default in payment of fine, ordered the convict to undergo simple imprisonment for a period of three months. The case came to be referred to this Court to consider the question of confirmation of

capital punishment and Criminal Confirmation Case No.9 of 2004 came to be registered in this Court. The convict-Ratansinh alias Chinubhai Anopsinh Chauhan challenged the judgment and order recording his conviction by preferring Criminal Appeal No.1915 of 2004. As these two matters arise out of the same judgment, they are heard together and are decided by this common judgment.

1.1 The convict is referred to as "the accused" and the victim girl (deceased) is referred to as "the victim" in this appeal.

2. The prosecution case, in brief, can be stated thus:-

2.1 Ratansinh alias Chinubhai Anopsinh Chauhan, the accused is a resident of Village Bhamaiya and stays in Mota Falia area. On the day of incident, i.e. on 16th August, 2003, it is alleged that at about 15 hours, while the victim was playing with her friends in the courtyard of the accused, the accused scolded them, as a result, the two friends went away and the accused pushed the victim into his house and shut the door. This was seen by P.W.16-Shakariben Chandrasinh. Thereafter, a cry of the victim praying

for help was heard by P.W.16-Shakariben. Nothing happened thereafter, but on the next day, dead body of the victim was found from a nearby field. The dead body was wearing a white frock and no undergarments. The undergarment of the victim was found from the hedge falling between the house of the accused and one Chandrasinh. An offence was registered and investigation started. During the course of investigation, statements of various witnesses were recorded including that of Sarojben alias Bhuri, Shobanaben, Chandubhai, Himatbhai, etc. Sarojben alias Bhuri is a child witness, who was playing with the victim just before the incident. The police collected samples, etc. from the place of incident and, ultimately, the accused came to be arrested on 19th August, 2003. When he was arrested, a suicide note allegedly written by the accused was recovered from his pocket. He was found to have sustained some injuries on his person, which were recorded in the arrest Panchnama. He was sent for medical examination also. The postmortem of the dead body of the victim was also got performed. Ultimately, the investigating agency having found sufficient material to connect the accused with the crime, filed charge sheet in the Court of learned Chief Judicial Magistrate, Godhra. The

learned Chief Judicial Magistrate committed the case to the Court of Sessions and Sessions Case No.4 of 2004 came to be registered.

2.2 Learned Judge of the Trial Court framed charge at Exhibit 3. The accused pleaded not guilty to the charge and claimed to be tried. After recording the evidence led by the prosecution, the Trial Court recorded statement of the accused under Section 313 of the Code of Criminal Procedure and, ultimately, found him guilty of the offences punishable under Section 376, 302 and 201 of I. P. C. and awarded sentence as stated above. No separate sentence was awarded for the offence punishable under Section 201 of I. P. C.

3. Learned Advocate, Mr. Buddhbhatti, appearing for the accused in both the matters has contended that the prosecution case depended on circumstantial evidence as there was no eye-witness to the incident. The prosecution relied on and the Trial Court accepted the circumstances to be leading to exclusive hypothesis of guilt of the accused where the Trial Court committed an error. According to Mr. Buddhbhatti, the Trial Court has taken

into consideration certain circumstances while accepting the chain to be complete which, in fact, are not proved on record. Mr. Buddhbhatti submitted that the evidence in support of the circumstances of last seen together is not cogent or reliable. He submitted that to prove the case of last seen together, the prosecution has examined Shakariben (Exhibit 49), Sarojben (Exhibit 44) and Shobhanaben (Exhibit 47). Mr. Buddhbhatti submitted that evidence of these witnesses does not inspire any confidence. Shakariben, though claims to have seen accused forcibly pushing the victim into his house, has not raised any objection or hue or cry in that regard. The matter does not end there, but she claims that after some time, she heard a cry of the victim praying for help. Still she does not take any action. When on the next day body was discovered, then also this witness does not say anything to anyone, not even to her husband. She does not say anything even though her son-Dasharath was apprehended by police and kept under custody for about two days. It is only on 18th August, 2003 that, for the first time, she states before police about having seen the accused pushing the victim into his house forcibly. Mr. Buddhbhatti submitted that, likewise, if evidence of Sarojben is

seen, she says that she was playing with the victim just prior to the accused scolding them on the day of the incident. She then says that the accused sent the victim to purchase a packet of Vimal Masala. She also claims that she saw the victim, thereafter, going with a packet of Vimal Masala. The prosecution has then examined Himatbhai, who is a shopkeeper and he states that the victim had come to his shop on the day of incident at about 3.15 P.M. and purchased some eatables. Mr. Buddhbhatti, therefore, submitted that these three pieces of evidence are inconsistent with each other and wipe out the evidence of each other.

3.1 Mr. Buddhbhatti submitted that, if the medical evidence is seen, there were maggots found in the body. The postmortem was performed by the doctor on 17th August, 2003 between 16.15 hours and 17.45 hours, i.e. within about 25 to 26 hours of the alleged time of the incident. The dead body could not have developed maggots in such a short time and, therefore, the time of death must be prior to the alleged time of death.

3.2 Mr. Buddhbhatti submitted further that during the

course of investigation, dog squad was called and the dog tracked to the house of Dasharath Chandrasinh, son of Shakariben. It has come on record that Dasharath was taken by police as a suspect and kept under custody for about two days. However, what happened during these two days is not disclosed by the Investigating Officer. On the contrary, he denies to have apprehended Dasharath and kept him under custody for two days. The investigation is, therefore, not honest. Mr. Buddhbhatti submitted that even if we accept that Dasharath was not apprehended or kept under custody for two days for interrogation, as per the say of the Investigating Officer, when the dog squad tracked to the house of Dasharath, the Investigating Officer ought to have investigated into the direction of possibility of involvement of Dasharath in the incident.

3.3 Mr. Buddhbhatti submitted that the arrest Panchnama of the accused indicates some injury on the private parts of the accused. He was immediately, thereafter, sent to doctor for examination and the doctor did not find any injury on the private part of the accused.

3.4 Mr. Buddhbhatti also contended that the evidence of doctor who performed the postmortem makes it clear that there was no penetration and, as such, no case of rape could be said to have been established.

3.5 It was also contended by Mr. Buddhbhatti that the vaginal swab indicates presence of blood with semen and there is no evidence to show any bleeding injury on private part of the victim. The presence of blood in the vaginal swab, therefore, would remain unexplained. It was also contended that, F. S. L. Officer was summoned on 19th August, 2003 and the stone alleged used in commission of the murder was recovered on that day, as can be seen from the report of the F. S. L. Officer as well as his deposition. Still the Investigating officer has drawn discovery Panchnama on 20th August, 2003 and then on 22nd August, 2003, when the accused is alleged to have discovered the stone used inflicting injury on head of the deceased, which was the cause of her death.

3.5 Learned Advocate, Mr. Buddhbhatti, submitted that no semen stains were noticed on the clothes of the deceased as well as the accused when the Panchnama was drawn. However, in the F.S.L. report somehow semen stains are noticed. Mr. Buddhbhatti submitted that the Trial Court has considered the alleged bad character of the accused as one of the circumstances against him, which is an error of law.

3.6 Mr. Buddhbhatti also submitted that the Trial Court has relied on the suicide note recovered from pocket of the accused along with other circumstances. However, according to Mr. Buddhbhatti, the suicide note does not connect the accused with the crime even remotely. The suicide not is, in fact, an evidence in favour of the appellant, which is overlooked by the Trial Court.

3.7 Learned Advocate, Mr. Buddhbhatti, in support of his contentions, relied on the following decisions :-

(1) Shankarlal v. State of Maharashtra, AIR 1981 SC 765.

(2) Sharad Birdhichand Sarda v. State of Maharashtra, AIR 1984

SC 1622.

(3) Ramesh Babulal Doshi v. State of Gujarat, AIR 1996 SC 2035.

(4) Surinder Pal Jain v. Delhi Administration, AIR 1993 SC 1723.

(5) Koli Makod Khoda v. The State of Gujarat, 1986(1) Crimes 513 (Gujarat).

(6) State of U. P. v. Desh Raj, (2006) 2 SCC (Cri.) 489.

3.8 Learned Advocate, Mr. Buddhbhatti submitted that the prosecution evidence does not establish each circumstance to connect the accused with the crime by cogent evidence. The evidence does not lead to an exclusive hypothesis of guilt of the accused and none else. The chain, therefore, is incomplete and, therefore, the possibility of the accused being falsely implicated cannot be ruled out. The conviction is, therefore, erroneous and may be set aside and the accused may be acquitted of the charges levelled against him by allowing Criminal Appeal No.1915 of 2004.

4. Learned Advocate, Mr. Budhbhatti, submitted that the

accused challenges the conviction itself for the reasons submitted by him and, therefore the conviction may not be upheld. In the event the Court comes to the conclusion that the conviction is justified, then also this will not be a rarest of rare case where capital punishment is required to be awarded. The Trial Court has not followed the procedure properly and awarded capital punishment without undertaking the exercise of balancing the mitigating and aggravating factors while awarding capital punishment. The Trial Court has not recorded any special reasons to show that unless capital punishment is awarded, justice will not be done to the society as the accused is a menace to the society. Mr. Buddhbhatti submitted that the capital punishment, therefore, may not be confirmed and the Confirmation case may be dismissed.

5. Learned Additional Public Prosecutor, Mr. Gohil, submitted that there is evidence in the form of last seen together proved through depositions of Sarojben and Shakariben. There is evidence of Shobhanaben, who also says that, after taking meals, the victim was playing with her friends. A cry was heard by Shakariben raised by the deceased for help and then, on the next

day, dead body was found. Around the time when the incident occurred, accused was the only person in the house as his wife and children had gone out of station. Blood stains were found from his house and his clothes. Mr. Gohil submitted that the suicide note found from the pocket of the accused at the time of his arrest ex-facie may not connect him with the crime, but the fact that he had written such a note while he was away from the village would be sufficient to indicate that he had a guilty conscience and was trying to protect his interest. He otherwise had no reason to write such note.

5.1 Mr. Gohil submittd that the conduct of the accused of not being available after the incident is also significant. Mr. Gohil submitted further that injuries were found on private parts of the accused as well as the victim. Vaginal swab also indicated presence of semen with blood. The sample of soil taken from the place where the dead body was lying indicated presence of semen of the group of the accused.

5.2 Trying to explain the conduct of Shakariben, Mr. Gohil

submitted that Shakariben has indicated that she was intimidated by the accused. The accused was a drunkard and a highhanded man and, therefore, out of fear, she did not take any action or did not disclose about having seen the incident. Mr. Gohil submitted that a lapse here or there on part of the Investigating Officer would not be fatal to the prosecution. He placed reliance on the following decisions in support of his contentions:-

(1) *Bhagwania v. State of Rajasthan, 2001 Cri. L. J. 3719 (Rajasthan)*.

(2) *Chauna Orang. v. The State of Assam, 1981 Cri. L. J. 1661*.

(3) *State of U. P. v. Satish, (2005) 3 SCC 114*.

(4) *Geetha v. State of Karnataka, (2000) 10 SCC 72*.

(5) *Dhananjoy Chatterjee v. State of West Bengal, (1994) 2 SCC 220*.

(6) *Prithvi v. Nam Raj & Others, (2004) 13 SCC 279*.

(7) *State of M. P. v. Santosh Kumar, (2006) 6 SCC 1*.

5.3 Mr. Gohil submitted that the Trial Court has considered the evidence in its proper perspective, evaluated the same keeping the settled principles of law in mind and has demonstrated in its

judgment how the chain of circumstances leading to the guilt of the accused is established and, therefore, there is no question of interfering with the conviction.

5.4 Mr. Gohil submitted that the accused has committed a heinous crime. He has raped a young child of about 6 years of age and has then, to destroy the evidence committed her murder and thrown her body away. The accused has committed this crime only to satisfy his lust and whenever in future he is out from prison, somebody else may fall prey to him and, therefore, the Trial Court is justified in awarding capital punishment. He, therefore, submitted that the appeal may be dismissed and the punishment of hanging awarded by the Trial Court to the accused may be confirmed.

6. We have taken into consideration rival side contentions and have also examined the record and proceedings from their respective perspective.

7. Having gone through the record and proceedings, we

find that the case of the prosecution depended on circumstantial evidence. It is a settled position of law that for recording conviction, the prosecution must establish a complete chain of circumstances connecting the accused with the crime. Each circumstances must be incriminating and leading to the exclusive hypothesis of guilt of the accused ruling out the possibility of involvement of somebody else and, if the chain is not complete or any of the circumstance is not founded on cogent evidence, conviction cannot be recorded.

8. In the instant case, there is no dispute that the deceased met with a homicidal death. Evidence of Dr. Shashikant Nagori (Exhibit 6) indicates presence of injuries on left mastoid region, which was bone deep and brain matter was coming out of the wound. There was heamatoma over whole skull on both parietal and frontal region. There was bleeding from left ear. There was a depressed fracture of skull on frontal region and left parietal region. The doctor has opined that these injuries were sufficient in ordinary course of nature to cause death. Under the circumstances, we confirm that the death of the deceased was homicidal.

9. Now, on question of rape, there is no direct evidence. The medical evidence, therefore, is the only circumstantial evidence which can be relied on. In this regard, Dr. Nagori (Exhibit 6), has deposed that when he examined the dead body, he found swelling of 3 x 2 cms. on right labia majora and abrasion over left labia majora. It is also recorded in the postmortem notes that in per vagina examination, it was found that little finger passed with difficulty and there was no internal injury. The postmortem notes also indicate abrasions on both thighs, both knees and bruises over legs. In his deposition, the doctor has deposed, after describing the injuries. that the injuries found on labia majora were possible in an attempted rape. During cross-examination he has deposed that, if there was penetration of penis in the vagina, there was possibility of internal injuries. He has stated in terms that from the postmortem examination, in the instant case, there was no penetration of penis in the vagina.

9.1 It is, thus, clear that the offence of rape was not proved by the prosecution beyond reasonable doubt. At the most, it can be

considered as an attempted rape. The Trial Court, therefore, could not have recorded the conviction for offence of rape punishable under Section 376 of I. P. C.

10. Reliance was placed by learned Additional Public Prosecutor on decision of Rajasthan High Court in the case of ***Bhagwania v. State of Rajasthan, 2001 Cri. L. J. 3719***, where it has been held that in a case of rape of minor, complete penetration of penis with emission of semen and rupture of hymen is not necessary to be established. In the instant case, however, the medical evidence clearly indicates that there was no penetration at all. According to the doctor, had there been penetration, there was possibility of internal injury in the vagina, which was absent. Here is a case of no penetration unlike the case of Bhagwania *(supra)*. As such, this decision cannot be of any help to the prosecution.

11. Now that we find that the deceased was murdered and that, at the most, there was an attempted rape on her, the question that arises is whether the prosecution was able to establish the chain of circumstances connecting the accused with the crime. The

first, foremost and strongest circumstance indicated by the prosecution is the evidence in the form of the victim having been seen last in company of the accused. To bring home this circumstance, the prosecution has examined Sarojben, at Exhibit 44. Sarojben is a child witness, who was playing with the deceased just before the alleged incident. The Trial Court, after assessing her mental status, deemed it fit to administer oath as she is a child witness. She says that, she was playing in the courtyard of the accused with the victim and Parul around 3.00 P.M. on the day of the incident. At that time, the accused came and shouted at them. Therefore, she and Parul ran away. The victim was left behind. The accused, therefore, sent the victim to purchase a packet of Vimal. The witness says that, she went to her home and was doing lesson. She says that she saw the victim going with a packet of Vimal for giving it to the accused. The witness identified the accused in the Court. During cross-examination, she says that there are about 5 to 7 houses located in the same line of the house of the accused. There are certain houses in the opposite line also and the house of the father of the victim is in the opposite line and it is possible to see what is transpiring in the house located in the

opposite row. She says that the accused except shouting “Ladidiyo” which means young girls, did not speak anything.

11.1 Shakariben is examined as P.W.16 at Exhibit 49. She says that around the time when the incident occurred, i.e. between 3.00 P.M. and 4.00 P.M., she was washing clothes and that the victim, Parul and daughter of Arjun were playing in the courtyard of the accused. She says that there is a hedge between her house and the house of the accused. The accused drove away Parul and daughter of Arjun and then caught the victim and pushed her into his house. Thereafter, she heard cry of the victim and then she heard sound of beating. She then says that she went into the house thereafter. She said that the accused had threatened her that, if she talks to anyone in the town, he would kill her and her son. She has further stated that the accused had arrived at about 2.30 P.M. on the day of the incident and he was drunk. He tried to push open the rear door of the house. The witness said that the mother of the accused, Divaliben, had given the key of the house to her and, therefore, she gave the key to the accused. The witness has further stated that, on the next day, when mother of the victim was

searching the victim, she told her that she had not seen the victim and she may join the search. During cross-examination, the witness has admitted that she had not stated in her statement before police that the accused had intimidated her. She does not know, whether the accused was ever prosecuted under the Prohibition Act. She says that she does not know whether the victim had gone to purchase Gutka packet. The distance between her house and the house of the accused is 25 to 30 feet. She says that she did not tell her husband or her son about the incident. She admits that she did not state before police that, at the time of the incident, she went into the house after washing clothes and sat in the house and, at that time, accused had intimidated her that, if she tells anyone in the village, he would kill her and her son. She admits that, on the day of incident as well as on the next day, when people were searching for the girl, she did not tell anyone about the incident. She also admits that she joined the group searching for the victim. She says that, on the day next to the day of incident, police had come, dog squad had also come and the dog had tracked to her house and police took away her son from the F.C.I. Godown and detained him in Police Station for two days.

She stated that because her son had not committed any crime, he was released by police. She says that her son's name is Dasharath and the second son is Ishwar.

11.2 P.W.17-Himatbhai Kalubhai is examined at Exhibit 50. He runs a grocery shop at Bhamaiya. He knew the victim and her elder sister-Shobhana. He says that on 16th August, 2003, the victim had come to his shop at about 3.00 P.M. to purchase eatable. She purchased eatable for Rs.1, then she went away. During cross-examination, he says that it had not happened that the victim had come to his shop to purchase Vimal Gutka. He admits that he had not stated in his statement before police on 19th August, 2003 that the victim had come to his shop to purchase eatable. According to him, it would take about 10 to 15 minutes for a person to reach his shop from Mota Falia, where the victim was staying. The victim halted at his shop for about five minutes and left the shop around 3.15 P.M. On being asked as to why he did not inform police while giving statement on 19th August, 2003 about the victim's visit to his shop to purchase eatable, he has not given any specific reply, but has stated that when Taluka Police

came, he indicated this to the Taluka Police.

12. From depositions of these three witnesses, the prosecution has tried to establish the circumstance of the accused having been seen in company of the deceased last. But scrutiny of this evidence leads us to negative this aspect. According to P.W.12-Saroj, she was playing with the victim and Parul. Accused arrived around 3 o' clock and shouted “Ladidiyo” (meaning young girls). Therefore, she and Parul ran away and the victim was left behind. She says that accused sent the victim to purchase a packet of Vimal. She also says that, thereafter, she went home and was doing lesson. She saw the victim going with a packet of Vimal to give it to the accused. Therefore, necessarily, if her say is taken at face value, then also the victim was seen going to the house of accused with a packet of Vimal and if she did factually reach there, at that point of time, neither Saroj nor Parul was present.

12.1 Against the above situation emerging from deposition of Saroj, if deposition of Shakariben (Exhibit 49) is seen, she says that when Saroj, the victim and Parul were playing in the courtyard

of the accused, the accused arrived and drove away Parul and Saroj and caught hold of the victim and pushed her into the house, whereafter she heard cry of the victim and then sound of beating, meaning thereby that when the deceased was taken into the house, that was the last point of time when she was seen in company of the accused and, at that point of time, both Saroj and Parul were present, which is just contrary to what Saroj says. Viewed from another angle, Shakariben does not speak of any event taking place before the victim was pushed into the house and thereafter the incident has occurred, as against the say of Saroj that the accused sent the victim to get a packet of Vimal. Necessarily, therefore, what Shakariben saw was not the last point of time when the victim and the accused were together. The victim was seen by Saroj at a later point of time and also by witness-Himatbhai. Parul has not been examined by the prosecution as a witness. Therefore, the evidence regarding the accused seen last in company of the deceased, as led by the prosecution, is inconsistent and self-contradictory.

12.2 Apart from the fact that the evidence is inconsistent, the

evidence of Shakariben also does not inspire confidence for several other factors. Shakariben, who claims to have witnessed the accused pushing the victim into the house and then hearing the cry of the victim followed by sound of beating, does not take any steps to rescue her nor does she tell about this incident to anyone, including her husband and son, till 19th August, 2003, when her statement was recorded. The explanation given by her that she was intimidated by the accused is an improvement made with a view to support the prosecution case and is an afterthought because she has not stated this aspect in her statement before police nor has she stated about this to anyone else. If the sequence of events, as described by her, is seen, there was no occasion for the accused to intimidate her. The accused came, this witness gave the key of his house to him, the accused went to his house, shouted at the girls, the two other girls went and the accused pushed the victim in to his house. Thereafter the witness went into her house! When and why the accused could have intimidated the witness is a question unanswered.

12.2.1 On the next day of the incident, when the search was

on for the victim, she does not disclose anything about the incident. On the contrary, she joins the group searching for the victim. This would not have been her conduct, if she had really seen the accused pushing the girl into the house followed by cry of the victim and still followed by sound of beating.

12.2.2 To add support to her version, she has stated that the accused was in a drunk condition. During cross-examination, she says that she does not know about any prosecution against the accused for consumption of liquor. She also pleads ignorance about the accused sending the victim for purchase of Vimal Gutka, which is the case of Saroj. Therefore, Shakariben is a witness who claims to have seen the accused pushing the victim into his house followed by her cry and the sound of beating. Still she does not take any action nor does she inform anyone till her statement was recorded two days after the incident and, on the contrary, on being asked by mother of the victim, she says that she had not seen the victim and she may join the search party. This sounds to us very unnatural. We are conscious of the fact that different persons react to an incident in different manner. But here is a case which is

founded on circumstantial evidence and the prime circumstance is of the deceased seen last in company of the accused. The evidence of this witness is the only evidence which is heavily relied on by the prosecution because she is the only person who says that she saw the accused pushing the victim into his house, whereafter, the incident is alleged to have occurred and the dead body found on the next day. Evidence of Saroj cannot be considered as that of having seen the deceased last in company of the accused. All that she has seen last is the deceased going with a packet of Vimal. She has presumed that she was going to give it to the accused. This version of Saroj is also not free from doubt for the reason that she says that she went home and started doing lesson. Then she could not have seen the victim going with a packet of Vimal Gutka. There is no evidence to show that the victim did reach the house of the accused and meet him. Even otherwise, the evidence led by the prosecution is not complete to show that the victim purchased Gutka. On the contrary, Himatbhai (Exhibit 50) says that the victim purchased eatable. If the victim had purchased eatable, then Saroj would have seen that packet of eatable in the hand of the victim. When Himatbhai says that the victim had not

purchased Vimal Gutka from him., then how Saroj could have seen a packet of Vimal Gutka in the hand of the victim? The prosecution has not led any evidence to show that the victim did purchase a packet of Vimal Gutka pursuant to the alleged direction of the accused. Therefore, what Saroj says that she saw the victim with a packet of Vimal Gutka for the accused does not inspire confidence.

12.2.3 What is claimed to have been seen by Shakariben, even if accepted as it is, would not be evidence of last seen together because, thereafter, Saroj claims to have seen the victim being sent to purchase Vimal packet and again seen her going with the packet of Vimal. Witness-Himatbhai also claims that the victim had come to his shop and purchased eatables.

12.2.4 What Shakariben claims to have seen could not have been at the point of time when the deceased allegedly went back with the Vimal packet (we may hasten to state that, on this, there is no evidence at all except say of Saroj that she saw the victim going back with Vimal packet) because, at that time, the victim

could not be playing with Saroj and Parul as they were already driven away first, according to Shakariben, and then the victim was pushed into the house.

12.2.5 If the situation is examined from a different angle, if what Saroj says had happened, then what Shakariben says could not have happened, because, according to Shakariben, on arrival, the accused shouted at the girls and drove away Parul and Saroj and pushed the deceased into the house and, if what Shakariben says is correct, what Saroj says could not have happened. The doubt assumes greater strength because of certain circumstances which would be discussed in the paragraphs to follow.

12.2.6 Examined from any angle, the evidence led by the prosecution on last seen together aspect cannot be accepted. It is not only contradictory, inconsistent and improbable, but it also suffers from vice of improvements and, therefore, to us, it sounds unreliable. The case is founded on circumstantial evidence. This is one of the major circumstances pressed by the prosecution. We also find that the investigation is not carried out properly and does

not inspire confidence. The evidence on last seen together aspect, therefore, cannot be accepted as a link in the chain of circumstances leading to exclusive hypothesis of guilt of the accused.

13. The accused came to be arrested on 19th August, 2003 and a Panchnama was drawn. The arrest Panchnama is at Exhibit 14. It is recorded that the accused had abrasions on chest, back and shoulder caused by nail. It is also recorded that there was swelling on his penis and swelling on skin with abrasion. This Panchnama was drawn between 16.15 and 16.45 hours. Soon thereafter, he was sent for medical check-up, which was performed by Dr. Prabhakar Bhatia (Exhibit 73). He has noticed the injuries on chest and back, which is described by him as linear abrasions. There were no foreign particles in his nails and, during cross-examination, he has admitted that he did not notice any injuries on penis of the accused. Therefore, the evidence led by the prosecution in the form of arrest Panchnama and medical evidence of Dr. Prabhakar Bhatia run contrary to each other as far as they relate to the injury on penis of the accused. The injuries recorded

while drawing Panchnama were not noticed by the doctor when he examined the accused within hours of the drawing of Panchnama. The Panchnama has recorded abrasion and, therefore, it could not have disappeared within such a short time. This aspect reflects adversely on the prosecution case. As regards injuries found on chest and back are concerned, they are tried to be shown as injuries caused with nail, possibly by the deceased, but the postmortem note does not indicate presence of any traces of skin of the accused in nail of the deceased. In fact, the postmortem note is silent on it.

14.1 From the above discussion of evidence, it is clear that even according to doctor, there was no bleeding injury on penis of the accused. There was no bleeding injury to the deceased either. There were no internal injuries in the vagina of the deceased. Against this, if the results of vaginal swab are seen, presence of blood and semen is found. How this could have been found is a question which has remained unexplained and unanswered. This would cast heavy doubt about the reliability of investigation. That apart, the group has remained unidentified so far as vaginal swab

is concerned.

14.2 If evidence of Shakariben is seen and, even as per prosecution case, the incident occurred in the house of the accused and this is tried to be proved through deposition of Shakariben, who says that accused pushed the deceased into his house and, thereafter, she heard cry of the deceased and then sound of beating. As per the prosecution case, blood stains of the group of the deceased were found in the house of the accused at various places. No trace of semen was found in the house of the accused. But, surprisingly, at the place where the dead body was found, semen was found on the ground. That was of the group of the accused. If the incident occurred in the house, the traces of semen ought to have been found in the house and not at the place where the dead body was found. No motive is indicated for the accused to murder the deceased immediately after pushing her into the house and, if the rape or attempted rape was committed in the house followed by alleged murder, there would have been traces of semen in the house. These factors have remained unexplained and seem to have gone unnoticed by the Trial Court.

14.3 Interestingly, as per the prosecution case, the accused committed murder of the victim by causing injury on her head with a grinding stone. In this respect, if the evidence is seen, the officer of the F.S.L. was summoned on 19th August, 2003, who inspected the place of incident, i.e. the house of the accused, and instructed the Investigating Officer to recover the stone which was, accordingly, recovered. This emerges from his report as well as his deposition (Exhibit 53). He has stated in his deposition that the stone was recovered on that day, i.e. on 19th August, 2003. Then, on 20th August, 2003, a discovery Panchnama is sought to be drawn in presence of Panch witness, which is of course a nil Panchnama as to discovery of stone, which is at Exhibit 25 and then on 22nd August, 2003, again a discovery Panchnama is drawn (Exhibit 30), where the accused is alleged to have discovered the stone from beneath a steel cupboard. The question is how this discovery could have taken place if the stone was already recovered by the Investigating Agency on 19th August, 2003 and what was the need for the Investigating Officer to draw such a Panchnama. Surprisingly, the Panchnama of August 20, 2003 for discovery of

stone is shown to be nil and then on 22nd August, 2003, discovery is shown. This, therefore, reflects on the nature of investigation carried out by the Investigating Officer.

14.4 Shakariben has admitted that the sniffer dog had tracked to her house and following that, her son was taken by police and was detained for two days, whereafter, he was let go as he had not committed any offence. This aspect is denied by the Investigating Officer. He flatly denies to have detained son of Shakariben, i.e. Dasharath, for two days. We have ourselves examined the case diary forming part of the record of the Trial Court and we find that there is no such entry. This would indicate two possibilities, (1) that the Investigating Officer did not detain or interrogate Dasharath for two days. In that event, the Investigating Officer can be said to have failed in his duty when the sniffer dog tracked to the house of Dasharath and (2) if he had detained Dasharath, as is stated by Shakariben, then his Case Diary is not the correct record of the investigation so made by him and he is not telling the truth before the Court. In either of the situation, investigation, cannot be considered as honest.

14.5 Strangely, though Shakariben claims to have seen the accused and the victim together last followed by cry of the victim and sound of beating, she keeps silence for two days. During this time, as per her own version, dog squad tracks to her house and her son-Dasharath is detained for two days. And then she gives statement to police after two days and her son-Dasharath is released by police and the accused is arrested!! These developments are very significant and speak for themselves on reliability of the investigation and evidence collected.

15. In light of the foregoing discussion, we are of the view that the prosecution evidence is not trust-worthy and suffers from doubtful situations. It would be appropriate, at this stage, to record the conduct of the accused. When the victim was found to be missing and people were searching for her, accused also joined the team to search for the deceased. Differently put, he had not fled away. Likewise, Shobhanaben was also there, who claims to have seen the incident, but she does not speak anything. If Shobhanaben had seen the incident and the accused was aware

about it, he would have kept away from the group and, thereafter, the accused seems to have left the village probably on realising that he is sought to be roped in. He came to be arrested on 19th August, 2003 and, at that time, a suicide note is found from his pocket, allegedly, written by him. That suicide note seems to have weighed with the Trial Court. The suicide note is produced at Exhibit 40. We have given the suicide note a close look and we do not find anything which would reflect his involvement in the incident. On the contrary, the tenor of the suicide note indicates that he was deeply grieved because of the filthy allegations flung on him by villagers in respect of the victim, who was like his own daughter. He had no face to show and the only alternative was to commit suicide. This suicide note, on the contrary, would help the accused rather than the prosecution. It cannot be treated as an attempt on the part of the accused to prepare a defence by reading between the lines or drawing a presumption in absence of any material to support such a conclusion.

16. In our opinion, therefore, the prosecution case is not established beyond the shadow of doubt. We have examined the

judgment of the Trial Court as well. In paragraph 30 of the judgment, the learned Trial Judge has observed that the conduct of the accused was to mislead the police and people. He participated in the search of the deceased actually on 16t August, 2003 and on 17th August, 2003, he went away and, before doing so, to eliminate the chances of any suspicion on him and with a view to misleading police and people, he had thrown the undergarment of the victim in the courtyard of Chandrasinh, the husband of Shakariben and father of Dasharath, and then went to village Hamirpura, obtained a book and pen from Jaideep and wrote down the suicide note. This has been shown as a strong circumstance, but we do not find any evidence to support the observation that the accused threw the undergarment of the victim in the courtyard of Chandrasinh and he went to Hamirpura and obtained a book and pen from Jaideep and wrote down the suicide note. These observations are made in absence of any material on record in that regard and are legally unsustainable.

16.1 Likewise, the learned Judge has considered that the accused drove away Saroj and Parul and sent the victim for

purchasing packet of Vimal and when she came back, he pushed her into the house and satisfied his lust. We do not find any evidence to show that it was after the victim brought a packet of Vimal that she was pushed into the house. The evidence in this regard is of Shakariben, who does not speak of sending the victim for bringing a packet of Vimal or her return with a packet of Vimal and, thereafter, the accused pushing the deceased into his house. On the contrary, she says that the accused drove away the two girls and then caught hold of the victim and pushed her into the house. Therefore, these observations are also dehors the evidence. The learned Judge has considered the explanation of the accused in his statement under Section 313 as one of the circumstances adverse to the accused, where he has stated that the victim was the granddaughter of his maternal aunt's son. This could not have been done by the learned Judge in light of decision in the case of ***Shankarlal Gyarasilal Dixit v. State of Maharashtra, AIR 1981 SC 765***.

17. In light of the foregoing discussion, we are of the view that the evidence led by the prosecution does not establish a

complete chain of circumstances to connect the accused with the crime. The investigation is not found to be independent, trust-worthy or reliable. There are major defects in the investigation which render the investigation doubtful and when the case is founded on circumstantial evidence, in our opinion, conviction cannot be recorded on such scanty, weak and incomplete evidence recorded through investigation which is found to be doubtful. The appeal, therefore, merits acceptance.

18. In ***State of U. P. v. Satish, (2005) 3 SCC 114***, relied on by the learned Additional Public Prosecutor, it was held that conviction can be based solely on circumstantial evidence, but it should be tested on touchstone of law relating thereto laid down by the Supreme Court. We have examined the case, as discussed above, and we have found that the evidence led by the prosecution is not reliable. The decision will not help the prosecution.

18.1 Learned Additional Public Prosecutor then relied on the judgment of the Apex Court in the case of ***Geetha v. State of Karnataka, (2000) 10 SCC 72***. In that decision, the Supreme

Court took a view that, in a case of circumstantial evidence, a false denial assumes importance as it would supply a missing link in the chain of circumstances. The view is taken on facts of that case where the incriminating circumstances were duly established by the prosecution. But, in the instant case, as discussed above, the prosecution has failed to establish the evidence against the accused beyond reasonable doubt.

18.2 The decision in the case of ***State of Orissa & Ors. v. Straw Products Ltd. & Another, (1994) 2 SCC 220*** was pressed into service by learned Additional Public Prosecutor to show that abscondance is a circumstance against the accused in case of circumstantial evidence. We find that, in the instant case, the accused did not abscond after the incident. On the contrary, he was very much available. He participated in the search for the deceased. It was true that he was arrested later on from a neighbouring village, but that was on 19th August, 2003. It, therefore, cannot be said that he absconded after the incident.

18.3 Learned Additional Public Prosecutor also relied on the

decision of the Apex Court in the case of ***Prithvi v. Nam Raj and Others, (2004) 13 SCC 279,*** to plead that faulty investigation could hardly be a ground for rejection of testimony of eye-witness which had a ring of truth in it. There cannot be any dispute in this regard, but when the case is founded on circumstantial evidence and when it is found that the investigation is not only faulty but also unreliable, it would be fatal to the prosecution case. The decision, therefore, cannot be help the prosecution.

19. Now that we have come to a conclusion that the conviction could not have been recorded by the Trial Court and the Trial Court ran into an error in convicting the accused, the appeal deserves to be allowed and the same is allowed. The judgment and order of conviction and sentence rendered by the Trial Court is hereby set aside. The appellant-accused is acquitted of the charges with which he was charged. The appellant-accused is ordered to be released from prison forthwith, if not required in any other case. Fine, if paid, shall be refunded.

20. Now, coming to the Confirmation Case, since we have

come to the conclusion that the conviction is not sustainable and we have allowed the appeal and acquitted the accused of the charges levelled against him, question of confirmation of the capital punishment imposed by the Trial Court does not survive. Criminal Confirmation Case No.9 of 2004 stands disposed of accordingly.

[A. L. DAVE, J.]

[BANKIM N. MEHTA, J.]

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